In The

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-852

LAWRENCE E. OATMAN,

Petitioner-Appellant,

-against-

NEW YORK STATE TAX COMMISSION,

Appellee.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE NEW YORK STATE TAX COMMISSION

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MOTION TO DISMISS OR AFFIRM

The appelle moves the Court to dismiss the appeal herein on the ground that the notice of appeal was not timely filed and on the further ground that it is manifest that no substantial Federal question was raised in the Court below.

The Nature of the Case

The question raised in the appeal is the alleged violation of procedural due process in the conduct of administrative hearings held by the New York State Tax Commission.

The Director of the Income Tax Bureau of the New York State Department of Taxation and Finance issued a statement of audit changes and a notice of tax deficiency against the appellant, Lawrence E. Oatman which determined the appellant's New York State personal income tax liability for the year 1967 to be in the amount of $1,176.46. The basis for the determination was that the appellant had not established a New York domicile outside of New York State and is still considered a domiciliary of New York State.

The appellant filed a petition with the New York State Commission for a redetermination of the tax deficiency claiming that he was not a domiciliary of New York State and owed it no taxes. A hearing was held before Nigel Wright, a Hearing Officer and a Civil Service employee of the appellee, New York State Tax Commission.

On January 10, 1974, the appellee issued a determination affirming the tax deficiency. The appellant then brought a proceeding for judicial review of the determination of the appellee. The proceeding was transferred to the Appellate Division, Third Department of the Supreme Court of New York, for initial disposition. The order of that Court confirming the determination of the appellee and dismissing the petition for judicial review was entered in the office of its Clerk on December 30, 1975. (A-3, 4). The Court in its decision held that there was no merit in the appellant's contention that the Hearing Officer is not independent and acts as a judge, jury and prosecuting attorney and that the appellee rules on the challenge to its own determination in violation of due process. The Court stated in its decision:

> "We find no merit in petitioner's contention that the conduct of the hearing by a hearing officer who is an employee of respondent and the making of the ultimate decision by the respondent itself constitute a denial of due process. The hearing procedures were conducted pursuant to the rules and regulations of the State Tax Commission (20 NYCRR 601.6). Similar procedures are uniformly followed throughout the administrative agencies of the State, and it is not claimed that any member of the State Tax Commission or the hearing officer participated in the original determination under review made by the Director of the Income Tax Bureau." (A1, 2)

The appellant then made a motion in the Appellate Division of the Supreme Court for leave to appeal to the New York Court of Appeals. The appellant's attorney in his supporting affirmation on the motion stated:

> "2. On December 23, 1976 (sic), this court rendered a decision which confirmed a determination of tax deficiency against the petitioner by the respondent. Attached is a copy of that decision. On January 5, 1976, I received an order with notice of entry based on this decision from the Attorney-General." (A-5)

On March 12, 1976, the Appellate Division entered an order denying the motion for permission to appeal to the Court of Appeals. The appellant then made a motion in the New York Court of Appeals for leave to appeal to that Court. (A-7, 8) Permission to appeal to the Court of Appeals of New York State was denied without an opinion by an order dated and entered June 8, 1976. (A-9) The appeal to this Court was then filed in the office of the Clerk of the Appellate Division, Third Department of the Supreme Court of the State of New York, on October 19, 1976. A copy of a notice of appeal was received in this office on October 20, 1976. The notice of appeal states that is is:

> " *** from the final order of the Appellate Division of the Supreme Court of New York, Third Department, entered December 30, 1975 and a copy with notice of entry served on appellant's attorney on September 27, 1976." (A-101)

On December 8, 1976, the jurisdictional statement in this matter was received in this office.

Statute and Regulation Involved

New York Tax Law

§ 171. Powers and duties of state tax commission

"The state tax commission shall:

• • •

> "Eighth. Take testimony and proofs, under oath, with reference to any matter within the line of its official duty. Any member of such commission, a deputy tax commissioner and such other officials and employees of the department of taxation and finance as may be nominated by such commission by resolution recorded in its minutes may be designated for the purpose of taking such testimony and proofs and any such member of the commission, deputy tax commissioner or other official or employee so nominated may be designated by such commission for the purpose of holding any hearing authorized or required under the provisions of this chapter."

The relevant regulation of the New York State Department of Taxation and Finance provides:

> "601.6 Hearing officers. (a) The State Tax Commission has designated members of its staff as hearing officers, pursuant

to section 689 of the Tax Law. Hearings upon petitions to the Tax Commission with reference to personal income tax or unincorporated business tax will be conducted by these hearing officers, and the evidence and arguments in opposition to the petitions will be presented by representatives of the Income Tax Bureau.

"(b) The hearing officer who conducts any such hearing will transmit to the Tax Commission the entire record, including the stenographic transcript of the hearing, exhibits offered in evidence and any briefs filed by the petitioner and the Income Tax Bureau, with his recommendations. The commission will review the record, make its decision thereon and notice of its decision will be mailed to the petitioner as provided in the Tax Law."

ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED BECAUSE THE NOTICE OF APPEAL AND THE JURISDICTIONAL STATEMENT WERE NOT TIMELY FILED IN THIS COURT.

Appellant states in his notice of appeal that he is appealing from the final order of the Appellate Division of the Supreme Court of New York, Third Department, entered December 30, 1975 and that a copy of such order with notice of entry was served upon his attorney on September 27, 1976. 28 U.S.C. 1257 provides that appeals are to be taken from the State's highest court in which the decision was rendered. The Court of Appeals was the highest court in this case. Its order and remittitur denying a motion for leave to appeal to that Court was dated and entered on June 8, 1976. The notice of appeal was filed on October 19, 1976. The jurisdictional statement was not received by this office until December 8, 1976.

The appellant seems to take the position that the appeal is from the order of the Supreme Court of New York, Appellate Division, Third Department. The appellant's attorney has made contradictory statements about the date of this service of the order although he admits it was entered on December 30, 1975.

However, the crucial point is that appeals are not taken from orders of that Court but from the highest Court of the State which rendered its decision in the matter, which is the New York State Court of Appeals in this case which was entered June 8, 1976.

This question was considered in *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264 (1942) rehearing denied 318 U.S. 802 (1942). In that case the Court considered the question of when the time to appeal to the Supreme Court starts running from an order of a State appellate court when that Court directs a lower State court to enter a judgment based on its decision. This Court said:

> "Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Atherton* v. *Fowler*, 91 U.S. 143, 146. In reliance upon the early decision in *Green* v. *Van Buskerk*, 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under § 237 of the Judicial Code, 28 U.S.C. § 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in *Mower* v. *Fletcher*, 114 U. S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts* v. *Hoagland*, 105 U.S. 701, 702, and *Clark* v. *Williard*, 292 U.S. 112, 117-118. This rule applies with equal force to cases from New York in which the judgment or order of the Court of

> Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of § 237 of the Judicial Code, a final judgment reviewable here.
>
> • • •
>
> Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

It is submitted that claimant's time to appeal ended 90 days after June 8, 1976 and therefore the filing in this Court of the notice of appeal and the jurisdictional statement were not timely. The appellant contends in his jurisdictional statement that he was not served with a copy of the order of the Appellate Division of the Supreme Court of the State of New York, Third Department until September 27, 1976. This statement is contradicted by his attorney's affirmation (A 5), "January 5, 1976, I received an order with notice of entry based on this decision (Appellate Divisin decision of December 30, 1975) from the Attorney General." Under the provisions of 28 U.S.C. 2101, the time to appeal starts to run from the entry of the order appealed from and not from the service of a copy of the order with notice of its entry.

POINT II

THE APPEAL SHOULD BE DISMISSED BECAUSE THE APPELLANT DID NOT RAISE A SUBSTANTIAL FEDERAL QUESTION IN THE COURT BELOW.

The appellant claims that he was denied due process of law by the appellee because the hearing officer at the administrative review of the determination of his New York personal income tax liability was an employee of the appellee. The appellant seems to claim that that fact alone shows that the hearing officer was not independent since the appellee is the administrator of the tax which was reviewed. He further claims that "the ultimate decision depends on the whim and caprice of the (appellee) since the Hearing Officer only recommends a disposition" and the appellee

makes all ultimate decisions and is allowed to be the judge, jury and prosecuting attorney.

Here the determination of the tax liability was initially made by the Director of the New York State Income Tax Bureau. The Director is an employee of the appellee, New York State Tax Commission. The administrative hearing to review the determination of tax and was held by a Hearing Officer in the Hearing Unit directly under the appellee. The Hearing Unit is not a part of the New York State Income Tax Bureau. No claim is made that the Hearing Officer participated in the making of the initial determination of tax. This was made by the Director of the Income Tax Bureau. The duties of Hearing Officers in the New York State Department of Taxation and Finance consist of conducting the hearing and making a recommendation to the appellee. The Hearing Officer does not make the final decision. The final decision is made by the Tax Commission. No claim has been made that the Hearing Officer was biased.

Due process is not denied by the fact that a hearing is held before an authority — a bureau of which preferred the charges upon which the hearing was held *(Fahey* v. *Mallonee,* 332 U.S. 91 (1946); *Friedman* v. *State,* 24 NY 2d 357 (1969) remit. amd. 25 NY 2d 905, app. dsmd. 397 U.S. 317).

It is common in administrative proceedings for decisions to be made by persons other than the officer or examiner who conducted the hearing. The practice has not been construed to be violative of due process *(Ramspeck* v. *Federal Trial Examiners Conference,* 345 U.S. 128 (1952); *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 [1950]).

CONCLUSION

THE APPEAL SHOULD BE DISMISSED.

Dated: December 29, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

RUTH KESSLER TOCH
Solicitor General

FRANCIS V. DOW
Assistant Attorney General
of Counsel

Supreme Court—Appellate Division
Third Judicial Department

A-1

December 23, 1975. 26072

In the Matter of LAWRENCE E. OATMAN, Petitioner,
v.
STATE TAX COMMISSION, Respondent.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission which denied petitioner's application for a redetermination of a deficiency for New York personal income tax for the year 1967.

Following a hearing at which petitioner testified, respondent found that in 1966 and 1967 petitioner was employed as a seaman in the Merchant Marine and was assigned to a ship which sailed to and from New York City; that prior to 1967 he was a domiciliary of New York and resided in Jackson Heights, Queens, New York, with his wife and infant child, and continued to keep this residence for his wife and son during 1967, where he supported them; that during 1967 a typical trip on board ship would be for three week's time with a one night layover between trips; that petitioner claims no domicile in any legal jurisdiction other than New York, nor does it appear that he spent less than 31 days in New York during 1967. On these facts respondent rejected petitioner's contention that he was not a domiciliary of New York State in 1967, and that, therefore, he did not owe income taxes for that year.

Respondent's determination is abundantly supported by the record. A person is a resident of the State subject to New York State personal income tax if he is domiciled in the State, unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than 30 days of the taxable year in this State. (Tax Law, § 605, subd. [a], par. [1]; 20 NYCRR 102.2.) It is clear that since petitioner has not even attempted to show that he acquired a new domicile in 1967, no change in domicile from New York could have been effected. (Rubin v. Irving Trust Co., 305 N.Y. 288, 306; Matter of Starer v. Gallman, ___ A D 2d ___ [decided herewith].)

We find no merit in petitioner's contention that the conduct of the hearing by a hearing officer who is an employee of respondent and the making of the ultimate decision by the respondent itself constitute a denial of due process. The hearing procedures were conducted pursuant to the rules and regulations of the State Tax Commission (20 NYCRR 601.6). Similar procedures are uniformly followed throughout the administrative agencies of the State, and it is not claimed that any

Supreme Court—Appellate Division
Third Judicial Department

member of the State Tax Commission or the hearing officer participated in the original determination under review made by the Director of the Income Tax Bureau.

Determination confirmed, and petition dismissed, without costs.

HERLIHY, P. J., SWEENEY, KOREMAN, MAIN and REYNOLDS, JJ., concur.

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department held at the South Mall Justice Building in the City of Albany, New York, commencing on the 17th day of November, 1975.

PRESENT:
HON. J. CLARENCE HERLIHY
Presiding Justice.

HON. MICHAEL E. SWEENEY
HON. HAROLD E. KOREMAN
HON. ROBERT G. MAIN
HON. WALTER B. REYNOLDS
Associate Justices.

In the Matter of LAWRENCE E. OATMAN,

Petitioner,

-against-

STATE TAX COMMISSION,

Respondent.

ORDER

County Clerk's
Index No. 3814-7

The petitioner having instituted a proceeding pursuant to CPLR Article 78 (transferred to the Appellate Division of the Supreme Court in the Third Judicial Department by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission which denied petitioner's application for a redetermination of a deficiency for New York personal income tax for the year 1967, and said matter having been submitted by the petitioner and argued by Francis V. Dow, Assistant Attorney General of counsel, for the

respondent, and after due deliberation and the Court having rendered a memorandum-decision on the 23rd day of December, 1975, it is hereby

ORDERED, that the determination of the respondent be and the same hereby is confirmed and the petition dismissed without costs.

ENTER:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: December 30, 1975.

A TRUE COPY
John J. O'Brien
Clerk

5. The second question of law is whether the petitioner received due process of law or not in the hearing procedures used by the respondent. The court argues in its decision that because similar procedures are uniformly followed throughout administrative agencies of the State, these procedures have to be in accordance with due process. This is a specious argument that could well justify keeping any law on the books in spite of constitutional infirmity simply because everybody is doing it. Certainly that argument was used successfully for many years to keep segregation of races in the South in effect. I think it is time that the practices of the administrative agencies were scrutinized. I think that an important question of consitutional law is involved in this matter and that the Court of Appeals should have the final say as to constitutionality of the hearing procedures. Certainly, if this court is right in its determination as to due process, then the Court of Appeals will affirm. But if this court is wrong, then the Court of Appeals should review such an important question.

Wherefore it is respectfully requested that this court grant the petitioner's motion for leave to appeal to the Court of Appeals.

Dated: January 20, 1976

WALLACE M. GERMAIN

SUPREME COURT:APPELLATE DIVISION
THIRD DEPARTMENT

In the Matter of LAWRENCE E. OATMAN,

Petitioner,

SUPPORTING AFFIRMATION

-against-

STATE TAX COMMISSION,

Respondent.

STATE OF NEW YORK)
COUNTY OF QUEENS) ss.:

I, WALLACE M. GERMAIN, an attorney duly admitted to all the courts of the State of New York, affirm to be true the following, under the penalties of perjury:

1. I am the attorney for the petitioner and familiar with the facts of this case. This affirmation is designed to support petitioner's motion for leave to appeal to the Court of Appeals.

2. On December 23, 1976, this court rendered a decision which confirmed a determination of tax deficiency against the petitioner by the respondent. Attached is a copy of that decision. On January 5, 1976, I received an order with notice of entry based on this decision from the Attorney-General.

3. No notice of appeal from this determination has been served pursuant to the dictates of section 5515 CPLR.

4. The petitioner believes that the two questions that were raised in this court bear scrutiny by the Court of Appeals. The petitioner made the first point that he acquired a domicile on a ship because that is practically where he spends all of his time. The court in its decision does not really ever address itself to this contention. I believe that this is a question of law of whether one can acquire a change of domicile by this method. This is an important question of law that the Court of Appeals should rule upon.

APPENDIX C

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 2nd day of February, 1976.

PRESENT:

HON. HAROLD E. KOREMAN,
Presiding Justice,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
HON. J. CLARENCE HERLIHY,
HON. WALTER B. REYNOLDS,
Associate Justices.

In the Matter of LAWRENCE E. OATMAN,

Petitioner,

-against-

STATE TAX COMMISSION,

Respondent.

ORDER

No. 26072

The petitioner, Lawrence E. Oatman, having moved for permission to appeal to the Court of Appeals from the Order dated and entered December 30, 1975, confirming the determination of the respondent and dismissing the petition without costs and the respondent having opposed the granting of such motion,

NOW after reading and filing the Notice of Motion dated January 20, 1976, the affirmation of Wallace M. Germain, dated January 20, 1976 in support of said motion and the affidavit of Francis V. Dow in opposition, sworn to the 26th day of January, 1976 and the Court having rendered its decision on the 8th day of March, 1976, it is

APPENDIX D

ORDERED that the motion for permission to appeal to the Court of Appeals is denied without costs.

ENTER

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: March 12, 1976

A TRUE COPY
John J. O'Brien
Clerk

MR. DOW

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth *day of* June *A. D. 1976*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

3 Mo. No. 443
Lawrence E. Oatman,
Appellant,
vs.
State Tax Commission,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

APPENDIX E

APPELLATE DIVISION OF THE
SUPREME COURT OF THE STATE OF NEW YORK
THIRD DEPARTMENT

LAWRENCE E. OATMAN,
Petitioner,

-against-

STATE TAX COMMISSION,
Respondent.

I. Notice is hereby given that Lawrence E. Oatman, the appellant above-named hereby appeals to the Supreme Court of the United States from the final order of the Appellate Division of the Supreme Court of New York, Third Department, entered December 30, 1975 and a copy with notice of entry served on the appellant's attorney on September 27, 1976.

II. This appeal is taken pursuant to 28 U.S.C.A. section 1257 (2).

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APPENDIX F